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# In the Supreme Court of the United States

OCTOBER TERM, 1980

**No. 80-405**

TRAN CON CORPORATION—
d.b.a. THE PALLADIUM,
*Petitioner,*

v.

THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
*Respondent,*

BAXTER RICE, as Director of the
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
*Real Party in Interest.*

## Opposition of Respondent to Petition for Writ of Certiorari

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## Opposition of Respondent to Petition for Writ of Certiorari

### PROCEEDINGS BELOW

The decision of the Department of Alcoholic Beverage Control that is the subject of this litigation, suspending petitioner's license for a specific period of time, is reproduced as Appendix B to the petition.

The order of the Court of Appeal, First Appellate District is reproduced as Appendix A of the petition, and the order of the Supreme Court of the State of California denying a hearing is reproduced at the back of Appendix A to the petition.

## JURISDICTION

Jurisdiction is asserted by petitioner under 28 U.S.C. section 1257(3).

## QUESTIONS PRESENTED

Respondent disagrees with petitioner's characterization of the questions presented, and believes they are more accurately phrased as follows:

1. Is the Department of Alcoholic Beverage Control licensing and regulatory scheme unconstitutional under the First Amendment as it permits the Department of Alcoholic Beverage Control to revoke or suspend a license upon a determination that a licensee is permitting entertainment in which there is a displaying of complete nudity, which the department has determined by regulation to be contrary to public welfare and morals?

2. Is there substantial evidence in the record to support the finding by the Department of Alcoholic Beverage Control that petitioner was not the victim of arbitrary and selective enforcement of the regulation at issue, and thereby there was no denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment?

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTE INVOLVED

Title IV of the California Administrative Code, section 143.3, at issue in this case, reads as follows:

> "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale licensee shall be held at any premises where such conduct or acts are permitted.
>
> "Live entertainment is permitted on any licensed premises except that:
>
> "(1) No licensee shall permit any person to perform sexual acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or the fondling of the breast, buttocks, anus, or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breast and/or buttocks are exposed to view perform only upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect to the invalid provision or application and to this end the provisions of the rule are severable."

## STATEMENT OF THE CASE

Petitioner's statement of the case generally sets forth with accuracy the chronology of events and facts. To the extent they are inaccurate or incomplete respondent will comment below.

The imposition of the discipline of 30 days suspension of the license has been imposed, commencing on September 4, 1980.

First, as to the facts relating to the alleged denial of equal protection, it was found specifically by the Department of Alcoholic Beverage Control in its administrative hearing that the Department had not "arbitrarily, unjustly or unequally applied Rule 143.3" against the licensee. (Determination of Issues No. II.) The Appeals Board affirmed. (Page A-42 of pet. br.) The agent who ordered the investigation of the licensee, a Mr. Gin, testified he had no knowledge about a similar performance in Los Angeles, (RT II, 63-64); that he never received instructions *not* to investigate and enforce Rule 143.3 as to any licensed premises (RT II, 78); and that the instructions he received from his superiors as to the instant licensee were the same as to any other violator (RT II, 80-81). He, the agent, conducted checks of other licensees in the same geographical area as licensee during the same month he noted this licensee's violations. (RT II, 82.) Other investigators within Gin's jurisdiction had also checked out the area for Rule 143.3 violations. (RT II, 18.) There was thus ample evidence to support the finding that petitioner had not been the victim of unequal protection of the laws.

As to the conduct which triggered discipline in this case, there is no dispute as to the facts in this case, i.e., the fact that several performers appeared, during the "performance" fully nude, with exposure of genitalia and pubic hair. (A-13, A-27, pet. br.) Department officials had visited the premises during a performance and had advised the licensee that the exposure of genitalia and pubic hair were violations of Rule 143.3, and that, if continued, disciplinary action would be necessary. Notwithstanding this forewarning, the licensee declined to comply, and subsequently charges were filed. (A-9 and A-14 of pet. br.) During the "performances" alcoholic beverages were served at the establishment. (A-14, pet. br.)

The Alcoholic Beverage Control Appeals Board affirmed the decision of the Department on appeal, and found the constitutional challenges to be without merit.

## REASONS WHY WRIT SHOULD NOT BE GRANTED

## ARGUMENT

### I. The First Amendment Issues Being Raised Were Disposed of in the La Rue Case

Petitioner correctly points out that respondent has relied on the case of *California v. La Rue* 409 U.S. 109, 93 S.Ct. 390 (1972) in disposing of his contentions.

This Honorable Court sustained the validity of the regulation here being challenged. It was not found to be overbroad or a violation of the First Amendment. Notwithstanding this decision, petitioner alleges that somehow the *La Rue* decision has lost some of its vitality. He asserts an *ipse dixit* statement, arguing that the agency cannot apply the regulation unless it concurrently finds disruptive and raucous behavior. (Pet. Br., pp. 7, 8.) Such a construction of the regulation would be absurd, for it would require continuing surveillance of the Department's limited number of enforcement agents who would be powerless to enforce the regulation until they observed some of the very conduct which precipitated the adoption of the regulation in the first place. Nor is there any case or statutory authority to support such a premise.

As this Court set forth expressly in the *La Rue* decision:

> "References to the transcript of the hearing submitted by the Department to the District Court indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with

> women entertainers; customers engaged in public masturbation, and customers rolled currency either directly into the vigina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers in the vaginal areas of female performers were reported to have occurred.
>
> "Prostitution occurred in and around some such licensed premises and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself and assult on police officers took place on or immediately adjacent to such premises." *Id.* at 111.

This Court noted that the conclusions drawn by the Department, after its public hearings and the evidence, was a rational one. *Id.* 116. The concept of accomplishing the same results by alternative means (such as excluding patrons already partially intoxicated) was flatly rejected, and the language provides an appropriate answer to petitioner's argument that raucous behavior must be a condition precedent.

> ". . . But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. . . . The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. (Citing *Williamson v. Lee Optical Co.* 348 U.S. 483, 487-488 (1955)." *Id.* 115.

Petitioner's other argument appears to rest on an assertion that, because the nudity herein was incorporated into a theatrical production it becomes a restriction on freedom

of expression, more so than in something like merely waitressing. (Pp. 10-11, pet. br.) In reliance thereto, he cites a California appellate court decision, *Locker v. Kirby* 31 Cal. App. 3d 520 (1973). But his arguments here were answered both in *La Rue* and in the California Supreme Court case of *Crownover v. Musick* 9 Cal.3d 405 (1973).

In *Crownover* the issue revolved around municipal ordinances which proscribed certain forms of dress in public places. In upholding the ordinances against a constitutional attack couched on the First Amendment, the Court noted, at page 425 of its decision:

> "It is clear that these provisions of the ordinances are directed at conduct—topless and bottomless exposure—and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech'. A common sense construction (citations omitted) of the pertinent provisions is that they proscribe nudity in specified public places. *They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on.* In a word the ordinances regulate conduct." (Emphasis added.) 9 Cal.3d at 425.

Furthermore, this Honorable Court indicated the continuing vitality of its *La Rue* decision in the case of *Doran v. Salem Inn, Inc.* 422 U.S. 922, 95 S.Ct. 2561 (1975), where it noted, at pages 2568-69:

> "Although the 'customary' type of nude dancing may involve only the barest minimum of protected expression we recognize in *California v. La Rue* (1972) 409 U.S. 109, 118, that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *La Rue,* however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-first Amendment, *outweighed any First Amendment*

*interest in nude dancing* and that a state could therefore ban such dancing as a part of its liquor licensing program. (Emphasis added.) 95 S.Ct. 2568-69.

For the above reasons, the First Amendment contention is devoid of any merit.

## II. The Law and the Facts Were Properly Applied to the Unequal Protection of Law Argument

As set forth by way of example in respondent's statement of the case, there was ample evidence before the administrative agencies to justify the conclusion that there was no purposeful and intentional unequal enforcement of the law in this case. Petitioner had the burden of proof of establishing the defense of discriminatory enforcement, and he failed in this task. *Snowden v. Hughes* 321 U.S. 1, 11, 88 L. Ed 497 (1944); *Murgia v. Municipal Court* 15 Cal.3d 286, 305 (1975); *Ehrlich v. McConnell* 214 Cal. App. 2d 280, 288 (1963).

Finding No. II of the Department of Alcoholic Beverage Control expressly set out that: "The Department is not, and was not, estopped from filing the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent."

Petitioner has attempted to cite other evidence in the record which would justify a contrary conclusion, but under well settled principles of appellate law, a reviewing court will not reweigh the evidence of the trier of fact below. *Kirby v. Alcoholic Beverage Control Appeals Board* 7 Cal. 3d 433 (1972). If the Court desires those portions of the administrative record supportive of Mr. Gin's testimony it can be supplied quickly by respondent.

## CONCLUSION

Respondent prays that the Petition for Writ of Certiorari be denied. Petitioner most assuredly has failed to meet the standards of Rule 19, (1)(a), U.S. Supreme Court Rules.
DATED: October 6, 1980

Respectfully submitted,

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